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No. 97-1642

In the Supreme Court of the United States

OCTOBER TERM, 1998

THE UNITED STATES DEPARTMENT OF THE ARMY,
PETITIONER

v.

BLUE FOX, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent does not dispute that this Court has uniformly rejected attempts to impose new financial obligations on the Treasury except as Congress by law expressly authorizes (see Gov't Br. 17-23), and that this Court repeatedly has held that subcontractors on government projects have no direct claim against the government (see Gov't Br. 23-28). Respondent, however, argues that the 1976 amendment to the Administrative Procedure Act— which inserted a partial waiver of sovereign immunity into 5 U.S.C. 702— altered those settled principles and opened the Treasury to new (and potentially limitless) non-statutory payment obligations, so long as the relief can be characterized as "equitable" in nature.

Respondent's theory cannot be reconciled with the fundamental principle that money from the Treasury is not something to which anyone is entitled absent an Act of Congress creating that right. It thus conflicts with Section 702's exclusion of "money damages," which bars recovery of money from the Treasury unless public funds were "the very thing" to which the claimant "was entitled" from the government in the first instance, *Bowen* v. *Massachusetts*, 487 U.S.

879, 895, 900 (1988), and with Section 702's preservation of the "duty of the court to * * * deny relief on any other appropriate legal or equitable ground." It ignores Section 702's limitation on the waiver of immunity to suits for "judicial review" of "agency action." And it disregards the effect of other statutes—the Tucker Act and the Miller Act—that impliedly forbid the monetary relief respondent seeks.

I. SECTION 702 EXCLUDES RESPONDENT'S SUIT FROM THE SCOPE OF THE IMMUNITY WAIVER

A. The waiver of sovereign immunity in 5 U.S.C. 702 excludes suits seeking "money damages." Respondent does not dispute that, under *Bowen*, monetary relief constitutes "money damages" within the meaning of Section 702 unless money from the Treasury was "the very thing" to which the claimant "was entitled" from the government in the first place. 487 U.S. at 895, 900 (quotation marks omitted); Gov't Br. 14-16.

Respondent contends (Br. 10), however, that general principles of equity "entitled" it to money from the Treasury. Even setting aside the fact that the equities hardly favor respondent,[1] the allegedly "well-established equitable rights

[1] While respondent blames the Army for failing to require Verdan to post a payment bond, respondent ignores the fact that *it* could have asked Verdan to prove that it had posted a bond, yet failed to do so. Gov't Br. 4. Respondent likewise blames the Army for paying Verdan after respondent complained of partial non-payment. When the Army investigated Verdan's missed payment, however, Verdan advised that it would pay respondent promptly. J.A. 27. Nor was it clear that withholding money from Verdan would have benefitted respondent: "It is hardly reasonable to withhold money in order to assure payments which perhaps can be made only from the money earned." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 243 (1947). Besides, respondent could have protected its own rights (without involving the Army) by bringing its equitable lien claim against Verdan—the contractor that owed it money—and demanding immediate payment or an injunction against dissipation. Respondent, however, did no such thing. Finally, while respondent accuses the Army of "conscious avoidance" of Miller Act bonding requirements, Resp. Br. 3, respondent ignores the genuine debate within the Army as to whether the contract as a whole was for services rather than construction and thus exempt from the bonding requirement. J.A. 44, 52.

of subcontractors to impose liens upon prime contract funds" (*ibid.*) cannot create an entitlement to public funds in the Treasury. Only an Act of Congress can do that. See U.S. Const. Art. I, § 9, Cl. 7; Gov't Br. 16-23; *OPM* v. *Richmond*, 496 U.S. 414, 416, 424, 432 (1990); *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1846) (money in Treasury cannot be garnished by creditors of payees without statutory consent); *Knote* v. *United States*, 95 U.S. 149, 154 (1877); *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 94 (1992).

As a result, respondent's discussion (Br. 12-16) of the origins of equitable liens is irrelevant. Money from the Treasury cannot be "the very thing" to which *anyone* is "entitled" unless an Act of Congress creates a payment obligation or authorizes its creation; judge-made principles of equity are insufficient. See, *e.g.*, *Richmond*, 496 U.S. at 426 ("equitable estoppel" is not "a basis for money claims against the Government"). In this case, respondent and its amici can identify no Act of Congress that obligates the United States to pay subcontractors when the prime contractor does not, or that licenses courts to impose such an obligation as a matter of common law or equity. Consequently, this suit must be dismissed as an action for money damages. *Dia Navigation Co.* v. *Pomeroy*, 34 F.3d 1255, 1266-1267 (3d Cir. 1994) (action is for "specific relief" only if it seeks "funds to which a statute allegedly entitles" the plaintiff); *Hubbard* v. *Administrator, EPA*, 982 F.2d 531, 536 (D.C. Cir. 1992) ("*Bowen*'s holding * * * does nothing for [plaintiff's] cause" because the plaintiff's "basic claim is not for enforcement of any legal mandate that the EPA pay him a sum of money.").

B. Respondent attempts to circumvent that result in three ways. None succeeds.

1. Respondent admits that *Richmond* and its predecessors reject the imposition of money-payment obligations on the Treasury based on equity alone, but contends that those cases apply only where an Act of Congress affirmatively prohibits the payment the plaintiff seeks. Resp. Br. 26-27. That argument sets the Appropriations Clause on its head: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976). The argument is also foreclosed by *Richmond*'s central holding, which is that "payments of money from the Federal Treasury are limited to those authorized by statute." 496 U.S. at 416.[2] Nor does it distinguish *Richmond*'s predecessors, *Buchanan*, *Knote*, and *Republic National Bank*. In none of those cases was there a statute prohibiting disbursement; yet in each this Court recognized that no right to public money in the Treasury could arise except as provided by an Act of Congress. *Buchanan*, 45 U.S. (4 How.) at 20; *Knote*, 95 U.S. at 154; *Republic Nat'l Bank*, 506 U.S. at 94.[3]

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[2] Respondent also seeks to distinguish *Richmond* on the ground that the primary case relied on there—*United States* v. *Testan*, 424 U.S. 392 (1976)—was a money damages action in the Court of Claims. Resp. Br. 29. But *Richmond* was not a Court of Claims case; it was (as respondent claims this suit is) an action for judicial review of agency action—OPM's refusal to award the claimant a disability annunity. See p. 8, *infra*. In any event, the fact that the principle first was articulated in cases brought in the Court of Claims—the specialized court where most non-tort monetary claims against the United States had to be heard—is immaterial, for the principle applies regardless of where suit is brought.

[3] Nor does it matter that additional funds have been appropriated to the Army for its operations and maintenance. Even where Congress has appropriated money to an agency (or created a fund for the payment of judgments), the Appropriations Clause bars courts from disbursing that money in the agency's stead except "on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Richmond*, 496 U.S. at 432. Indeed, in *Buchanan*, 45 U.S. (4 How.) at 20, the money had been appropriated and was actually in the

2. To the extent respondent argues (Br. 11) that this Court has already declared that subcontractors can obtain equitable liens against the United States with respect to public funds, respondent errs. This Court repeatedly has rejected such claims. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241 (1947) ("[N]othing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation."); *Equitable Sur. Co.* v. *McMillan*, 234 U.S. 448, 455 (1914) (liens permissible on private property not "permissible in the case of a Government work"); *J.W. Bateson Co.* v. *United States*, 434 U.S. 586, 589 (1978) (liens "cannot attach to Government property"); Gov't Br. 36-37 (citing additional cases).

Moreover, as explained in our opening brief (at 36-40), the cases respondent and its amici cite for the contrary proposition—*Prairie State Bank* v. *United States*, 164 U.S. 227 (1896), *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U.S. 404 (1908), and *Pearlman* v. *Reliance Insurance Co.*, 371 U.S. 132 (1962)—did not involve claims for funds vis-à-vis the United States itself. Rather, they concerned the competing claims of private parties on funds the United States had removed from the Treasury and as to which it had disclaimed any right or interest. Gov't Br. 36-40. As a result, those cases establish only that equitable doctrines may govern the relative priority of private claimants with respect to money, not in the Treasury, in which the United States has no interest. They cannot be read as holding that equitable doctrines alone can give subcontractors rights in public funds vis-à-vis the United States itself, or as overruling, *sub silentio*, the established principle that no

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hands of the Navy purser for payment to sailors; this Court held that the Appropriations Clause barred the attempt to garnish it nonetheless. See also *McCarty* v. *McCarty*, 453 U.S. 210, 229 n.23 (1981) (noting that doctrine of non-attachability of government funds established in *Buchanan* rests on the Appropriations Clause rather than sovereign immunity).

right to public funds in the Treasury may arise except as Congress by statute directs. Those issues were not before the Court. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (decision binding precedent only as to issues "squarely addressed"). When such equitable claims to public funds have been squarely presented, this Court has rejected them. See, *e.g.*, *Richmond*, *supra*.

Amicus Surety Association of America is thus mistaken to read *Pearlman* as holding that sureties can, through "subrogation," assert the rights of unpaid subcontractors against the United States; it likewise errs in concluding that subcontractors themselves must therefore have such rights against the United States. Surety Ass'n Br. 10-12. Because *Pearlman* involved "a dispute between the trustee in bankruptcy of a government contractor and the contractor's payment bond surety," 371 U.S. at 133, over funds in which the United States had no interest and had "turned over to the bankrupt's trustee," *id.* at 134, it did not address whether naked principles of equity could (consistent with the Appropriations Clause) afford sureties or subcontractors a right to funds in the Treasury as against the United States itself. Instead, to the extent *Pearlman* (like its predecessors) addresses the relative priority of subcontractor and surety claims by reference to their "equitable rights," the rights it recognizes are with respect to the claims of other private parties, which operate only once the United States has disclaimed any interest in, and parted with, the disputed funds. See 371 U.S. at 136 (resolution of case depends only on whether surety's "right" was "prior" to the bankrupt contractor's); see also Gov't Br. 38-40; *United States Fidelity & Guar. Co.* v. *United States*, 475 F.2d 1377, 1382 (Ct. Cl. 1973) (rights recognized in *Pearlman* and predecessors are rights

"vis-à-vis other claimants to the money" but not as against "the Government").[4]

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[4] Respondent's assertion that *Henningson* "specifically noted that the government had 'equitable obligations to see that the laborers and supplymen were paid'" (Resp. Br. 10-11) misreads that case. *Henningson*, like the other cases, involved a dispute between private parties over funds that were outside the Treasury. Gov't Br. 38-39 & nn. 18-19. Moreover, the passage from which respondent quotes—which states that the surety's payment on the bond had "released the Government from all equitable obligations to see that laborers and supplymen were paid," 208 U.S. at 410—did not suggest that laborers and suppliers (or, therefore, the surety through subrogation) had a judicially enforceable right to money from the United States. *Munsey*, and the longstanding rule it embodies (see Gov't Br. 23-28), refute that proposition. And while the quoted passage from *Henningson* may describe what the government ought to do with retained funds where (unlike here) it does not need the funds to complete the contract—and therefore describes an obligation that is "equitable" in a non-technical sense (*i.e.*, a moral obligation)—it in any event refers to an obligation to see that laborers and suppliers are paid, not an enforceable obligation of the United States to pay them itself.

Respondent's further assertion that *Houston* v. *Ormes*, 252 U.S. 469, 474 (1920), and *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121 (1924), recognize the right of private parties to encumber public funds through equitable liens, see Resp. Br. 20 n.4, is incorrect. Those cases (like the rest) hold only that private parties can obtain equitable rights with respect to the claims of other private entities. *Houston*, 252 U.S. at 473 (plaintiff had "an equitable right in the fund *as against Sanders* [the other private party]" (emphasis added)); *Mellon*, 266 U.S. at 124 (dispute between the Limited Company and Orinoco over rights in certificate). Besides, in those cases the money had been specifically appropriated to create a separate fund to pay claims; the government did not assert a proprietary or possessory right to the fund; and payment was a mere "ministerial duty." *Houston*, 252 U.S. at 473; *Mellon*, 266 U.S. at 125; see *Schmitz* v. *Societe Internationale*, 249 F. Supp. 757, 762 (D.D.C. 1966) (*Mellon* and *Houston* do not apply unless "Treasury officials [are] charged with the performance of no duty other than the ministerial duty of making disbursement of the fund," and "the fund [is] an especially earmarked account * * * and the United States [has] no claim or interest in the fund."), cert. denied, 387 U.S. 908 (1967); *Stitzell Weller Distillery* v. *Wallace*, 30 F. Supp. 1010, 1014 (D.D.C. 1940) (similar). Nor do those cases address remedies against the United States after the funds are paid to another private party, as occurred here.

3. Relying on decisions interpreting the Postal Service's sue-and-be-sued clause, 39 U.S.C. 401, respondent argues (Br. 11-12) that Section 702's limited waiver of immunity eliminates any barrier to "equitable lien" suits and the creation of other "equitable" rights to public funds. See also Surety Ass'n Br. 13-14; Amer. Subcontractors Br. 14-15.

a. This Court already has rejected the theory that a waiver of immunity can, by itself, give rise to monetary liability against the United States. See *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (government instrumentality not liable unless there is both a "waiver of sovereign immunity" and a "source of substantive law" applicable to the government that "provides an avenue for relief"). Indeed, *Richmond* demonstrates that point. There, the statute governing review—like Section 702 here—partially waived the immunity of the United States to suits for "judicial review," permitting the agency to be named as defendant. 496 U.S. at 418; 5 U.S.C. 7703(a)(1), (2). There, the claimant—like respondent here—asserted a right to federal funds under an equitable theory that Congress had not authorized by statute. 496 U.S. at 416. And there the Court held that, despite the waiver of immunity, equity alone could not create a substantive entitlement to money in the Treasury, because Congress had not conferred such a right by statute. *Id.* at 416, 424, 426, 432. That very holding disposes of respondent's claim that, given the partial waiver in Section 702, judge-made principles of equity can create an entitlement to public money in the Treasury here.

See pp. 13-14, *infra*. Respondent's reliance (Br. 20 n.4) on *United States* v. *Alabama*, 313 U.S. 274 (1941), and *Armstrong* v. *United States*, 364 U.S. 40 (1960), is also misplaced. Those cases merely hold that, when the United States acquires property that is already encumbered, its rights are subject to that encumbrance. Nowhere do they hold that unencumbered public money, already held in fee simple by the United States, can become encumbered by "operation of law" where no Act of Congress so provides.

Nor can respondent's argument be reconciled with the legislative history of the 1976 amendment to Section 702. As explained in our opening brief (at 35-36), it was uniformly understood that the waiver of immunity would not necessitate additional "appropriation[s] of funds," S. Rep. No. 996, 94th Cong., 2d Sess. 19 (1976). Indeed, the drafters of the 1976 amendment assured Congress that "[t]he monetary liability of the United States is left totally unchanged," *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 50 (1970) (*Senate Hearing*), and reassured Congress that the United States' historic immunity to garnishment actions had been preserved as well, *id.* at 134. Under respondent's view, however, the 1976 amendment to Section 702 broadly expanded the government's liability, subjecting the Treasury to money-payment obligations in equity—including "equitable liens," and "restitution," see Resp. Br. 10, 15—whenever the relief can be characterized as "equitable" and "specific." See *id.* at 15-16.

b. For similar reasons, the court of appeals decisions involving the Postal Service's sue-and-be-sued clause, cited by respondent and its amici,[5] do not assist them. In *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 520 (1984), this Court explained that the Postal Service's sue-and-be-sued clause, 39 U.S.C. 401, does not merely waive the Postal Service's immunity, but also "launche[s] the Postal Service into the commercial world" and makes its "liability"

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[5] See Resp. Br. 11-12 (citing *Active Fire Sprinkler Corp.* v. *United States Postal Serv.*, 811 F.2d 747, 756 (2d Cir. 1987); *Kennedy Elec. Co.* v. *United States Postal Serv.*, 508 F.2d 954 (10th Cir. 1974); *Wright* v. *United States Postal Serv.*, 29 F.3d 1426 (9th Cir. 1994)); Surety Ass'n Br. 13-14 (same cases); Amer. Subcontractors Br. 14-15 (same cases). The Subcontractors also cite two non-Postal Service cases—*Trans-Bay Engineers & Builders, Inc.* v. *Hills*, 551 F.2d 370 (D.C. Cir. 1976), and *Bor-Son Building Corp.* v. *Heller*, 572 F.2d 174 (8th Cir. 1978)—but those cases too involve the construction of a sue-and-be-sued clause.

in commercial matters largely "the same as that of any other business." Following that decision and its predecessor, *FHA* v. *Burr*, 309 U.S. 242 (1940), lower courts have sometimes concluded that 39 U.S.C. 401 authorizes them to impose liability on the Postal Service under equitable or common law theories (without regard to the Service's governmental character) as if the Service were "any other business." See *United Elec. Corp.* v. *United States*, 647 F.2d 1082, 1084 (Ct. Cl.) (some courts of appeals read the "broad, unlimited legislative declaration that the Postal Service could 'be sued'" as leaving them "free to apply doctrines applicable to private persons, including principles of restitution * * * to conclude that the equities of [a] subcontractor [a]re paramount to those of the [Postal Service]"), cert. denied, 454 U.S. 863 (1981).

Even if we assume, *arguendo*, that those lower court decisions are correct, Section 702 does not evince a similar intent to launch each and every federal agency "into the commercial world," or to subject the Treasury to monetary liability under judge-made equitable doctrines like "any other business." To the contrary, as pointed out in our opening brief (at 20-21, 32-33), the 1976 amendment to Section 702 was "purely procedural in nature," S. Rep. No. 996, *supra*, at 19, and avoided recognizing *any* source of substantive law—equitable or otherwise—as a basis for imposing new monetary liability against the United States. Gov't Br. 20-21, 33 n.14 (contrasting text of Section 702 with Tucker Act, Federal Tort Claims Act, and 39 U.S.C. 401); pp. 8-9, *supra*; see also *Furlong* v. *Shalala*, 156 F.3d 384, 394 (2d Cir. 1998) ("The APA is merely a procedural vehicle for review of agency action; it does not confer a substantive right" or "property interest."); *Stockman* v. *FEC*, 138 F.3d 144, 152 n.14 (5th Cir. 1998) (APA does "not declare self-actuating substantive rights, but rather, . . . merely provide[s] a vehicle for enforcing rights which are declared elsewhere" (internal quotation marks omitted)).

Because Section 702 does not itself impose substantive money-payment obligations on the United States (or license courts to create them), any plaintiff seeking public funds under Section 702 must locate a right to that money in the text of some other federal statute. *United States* v. *Mitchell*, 463 U.S. 206, 216-217 (1983) (where statute "does not create any substantive right enforceable against the United States," the "substantive right must be found in some other source of law" (internal quotation marks omitted)); *Testan*, 424 U.S. at 398; *Richmond*, 496 U.S. at 416, 424, 432. In *Bowen*, the plaintiff could locate such a statute, because its monetary claim was predicated on the Medicaid Act's declaration that "the Secretary * * * *shall pay* to each State" certain appropriated sums. 42 U.S.C. 1396b(a) (emphasis added); see 487 U.S. at 900 ("suit seek[s] to enforce the statutory mandate itself, which happens to be one for the payment of money"). Respondent, in contrast, effectively concedes that it cannot identify any statute entitling it to public funds. Consequently, the money respondent seeks from the Treasury is not something (much less the "very thing") to which respondent was entitled from the government, 487 U.S. at 895,[6] and its claim was properly dismissed

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[6] The American Subcontractors Association contends that a statutory right to compensation is not necessary because the Federal Circuit permits sureties—but not subcontractors—to sue the United States under the Tucker Act for retained contract funds. See Subcontractors Br. 17 (citing *National Surety Corp.* v. *United States*, 118 F.3d 1542 (Fed. Cir. 1997)). As explained in our opening brief, however, that decision (and others like it) do not hold that naked principles of equity, by themselves, can give rise to governmental payment obligations. Instead, they premise liability on the (sometimes strained) notion that the right of sureties to claim retained contract funds from the United States is based on contract; the Tucker Act, of course, expressly recognizes contract claims as a basis for monetary relief. See Gov't Br. 40 n.20; see also *Admiralty Constr.* v. *Dalton*, 156 F.3d 1217, 1222 (Fed. Cir. 1998) (subrogation sometimes "entitles sureties to succeed to the contractual rights of the [prime] contractor against the government"); *Balboa Ins. Co.* v. *United States*, 775 F.2d

by the district court as a prohibited action for money damages.

1158, 1160 (Fed. Cir. 1985) (surety "is as much a party to the Government contract as the contractor"); *National Surety*, 118 F.3d at 1547 (surety is beneficiary of government retainage clause); *Transamerica Premier Ins. Co.* v. *United States*, 32 Fed. Cl. 308, 312 (1994) ("[A] surety that has paid materialmen's claims can come directly against the Government" because "the surety is subrogated * * * to the right of the contractor to use these funds in the event he has paid his materialmen."). Setting aside the flaws in that reasoning, see Gov't Br. 40 n.20, it does not help respondent, since respondent disclaims any contract rights against the Army, and could assert such rights only in the Court of Federal Claims in any event, see pp. 18-19, *infra*.

For similar reasons, Tucker Act and Government Accounting Office opinions stating that the government may voluntarily pay an unpaid subcontractor with retained contract funds *owed to the prime contractor*, Resp. Br. 26-28, do not advance respondent's cause. Those opinions all address situations in which the government retained a set percentage of contract funds to ensure a performance that was ultimately completed, but (for reasons unrelated to performance) the funds were not turned over to the prime contractor. See, *e.g.*, *In re Naval Facilities Eng'g Command*, 57 Comp. Gen. 176, 178 (1977); *In re United States Coast Guard—Payment of Contract Retainages to Subcontractors*, No. B-218813, 1986 WL 63364 (Comp. Gen. Apr. 9, 1986). Because the money was owed to the prime contractors under the contracts, the GAO (following Federal Circuit precedent) allowed government agencies to satisfy their enforceable contract obligations by depositing the funds with a court and filing an interpleader; the court then determined who had the superior right to the funds. 57 Comp. Gen. at 178; 1986 WL 63364, at *2. Because the Army does not owe money to anyone under the contract in this case, those decisions do not help respondent; the Army is permitted to pay money out to satisfy its contract obligations, but it is not permitted to give out federal funds *gratis*. Indeed, the decisions upon which respondent relies expressly *bar* payment in the present circumstances, as they reject any notion that a subcontractor can receive public funds that have not been earned by, and are not owed under contract to, its prime contractor. 57 Comp. Gen. at 178 (funds that were "not earned by the defaulted contractor" cannot be paid out; only "money earned by the [prime] contractor but retained by the Government to assure contract performance" may be interpleaded).

C. The 1976 amendment to Section 702 not only expressly bars claims for "money damages," but also declares that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of courts to deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702. As explained in our opening brief (at 32-33), the established rule that equity cannot by itself impose money-payment obligations on the Treasury constitutes precisely such a "limitation" on judicial review and a "legal or equitable ground" for "deny[ing]" monetary "relief." See *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243, 244-245 (D.C. Cir. 1981) (R.B. Ginsburg, J.) (fact that substantive source of law relied upon does not apply to the United States or "expose" its "instrumentalities to liability" is grounds for dismissal under Section 702), cert. denied, 455 U.S. 919 (1982). For that reason as well, respondent is incorrect to assert (Br. 29-31) that the requirement of a statutory right to payment is an improper, extra-textual barrier to monetary relief.

D. That respondent seeks "money damages" is made especially clear by the fact that the specific fund to which respondent claims entitlement has been dissipated. See Gov't Br. 30-31 n.13. Thus, while respondent argues that equitable liens historically were thought of as "specific relief" because they create a right to a specific fund, Resp. Br. 13-18, that description does not fit cases where, as here, the specific fund to which the lien allegedly attached has ceased to exist. In such circumstances, the money the plaintiff seeks is a substitute for the very thing to which it was allegedly entitled, and is barred under Section 702 as money damages. See *Bowen*, 487 U.S. at 895; *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994).

That cases under the Tucker Act (Resp. Br. 18-19; Surety Ass'n Br. 19-21) and under the Postal Service's sue-and-be-sued clause (Resp. Br. 20-21) have permitted recovery despite dissipation of the fund changes nothing. If the fund no longer exists, then the monetary relief sought ceases to be

"specific relief" and constitutes "money damages" under *Bowen*, see *City of Houston*, *supra*, and at common law as well, see Restatement (First) of Restitution and Unjust Enrichment § 215, at 204 (proposed final draft, Mar. 4, 1936) (where property is dissipated, claimant cannot enforce lien or trust but instead "has only a personal claim against the wrongdoer"); *id.* § 161, at 20 (similar). Indeed, the fact that respondent and its amici rely on Tucker Act cases confirms that such an award constitutes damages, since the Tucker Act largely precludes equitable relief. See Gov't Br. 47-48.[7]

[7] Respondent's protest (Br. 21-23) that the Army dissipated the funds after respondent filed its suit and prayed for (but did not move for) an injunction against dissipation, is factually and legally without merit. The Army paid Verdan the money to which respondent claims entitlement long before respondent filed suit. Resp. Br. 1-2 (Verdan was paid between July and October of 1994; action was filed in April of 1995). And while the Army paid the replacement prime contractor, Dynamic, after respondent brought suit, respondent could not—even if the equitable lien doctrine applied—have any conceivable basis for demanding that money. A subcontractor's equitable lien can attach only to funds actually earned by its prime contractor and owed to the prime contractor under the contract. 3 D. Dobbs, *The Law of Remedies* 470 (1993) (subcontractor can enforce its claim only "against any funds still held by the landowner * * * which are owed to the general contractor"); 57 Comp. Gen. at 178 (no claim in equity for "the contract amount that was not earned by the defaulted [prime] contractor"); *United States* v. *MacDonald Constr. Co.*, 295 F. Supp. 1363, 1366 (E.D. Mo. 1968) ("This equitable lien, however, only extends to funds in the hands of the [debtor] which it has determined are due and payable to the prime contractor under the terms of the prime contract."); *Morgan* v. *Goodwin*, 355 So.2d 217, 219 (Fla. Dist. Ct. App. 1978); *C.T. Willard Co.* v. *City of New York*, 142 N.Y.S. 11, 24 (Sup. Ct. 1913). Respondent nowhere alleges that the money paid to Dynamic, which was for work that Verdan never did, was owed to Verdan. To the contrary, the district court specifically found that the money paid to Dynamic corresponded to work that Verdan never completed. Pet. App. 23a; see also J.A. 60, 61.

II. RESPONDENT'S CLAIM DOES NOT SEEK "JUDICIAL REVIEW" OF "AGENCY ACTION"

Respondent's "equitable lien" claim falls outside the scope of the waiver of immunity in Section 702 for the further reason that it is not a suit for "judicial review" of "agency action." See Gov't Br. 42-43. In fact, respondent's suit is precisely the sort of non-"review" commercial claim that placement of the waiver into the Administrative Procedure Act was meant to bar. See *id.* at 43-44.

A. Respondent asserts that the waiver of immunity in Section 702 is not limited to suits for "judicial review" of "agency action," and instead extends to "*all* non-damages actions seeking relief from official misconduct." Resp. Br. 35-36. But the very fact that the waiver appears in Section 702, the APA provision providing for "judicial review" of "agency action," refutes respondent's contention. Gov't Br. 42. Indeed, respondent does not dispute that Congress (and the 1976 amendment's drafters) repeatedly noted that the waiver was placed in Section 702 for the specific purpose of ensuring that it would apply only where Section 702 applies. Gov't Br. 42-43. Insofar as respondent claims that Section 702 permits suits other than those for "judicial review" of "agency action," its argument can be reconciled with neither the statutory text nor *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 882 (1990) (stating that anyone "claiming a right to sue [under Section 702] must identify some 'agency action' that affects him in the specified fashion," and that "it is judicial review 'thereof' to which he is entitled"). See Gov't Br. 45-46.

B. Respondent does not deny that its suit is framed as a commercial claim for money rather than judicial review of agency action. Gov't Br. 44-45. Nonetheless, respondent asserts that its equitable lien claim in substance seeks "review" of the Army's "action" of "continu[ing] payment of contract funds ($86,132.33) to Verdan," and the payment of

"$84,910.53 to [Dynamic]." Resp. Br. 34. If the supposed obligation to withhold payments from Verdan and Dynamic was the duty the Army allegedly breached and that is now subject to judicial review, however, then the only specific relief respondent can claim is an order requiring the Army to withhold the funds. Respondent, however, does not ask for such an order (and the funds already have been paid out).[8] Instead, respondent demands a cash payment for itself. Because that remedy would not require the Army to give respondent the very thing to which it claims it was entitled, and would instead give respondent money in compensation for the loss it suffered when Verdan failed to pay respondent, it constitutes the sort of "substitute" monetary remedy that Section 702 and *Bowen* bar as "money damages." See *Bowen*, 487 U.S. at 893.

The argument also fundamentally fails to explain how respondent's "equitable lien" theory can be reconciled with the waiver's limitation to "action[s] in * * * court" for "judicial review" of "agency action," 5 U.S.C. 702. See Gov't Br. 36. Respondent does not dispute that, under its theory, an equitable lien was levied on public money in the Treasury once respondent advised the Army that the prime contractor, Verdan, had not paid it. Even if we were to assume (incorrectly) that a suit to foreclose on such a lien could be construed as "an action in * * * court" for "judicial review" of "agency action," nothing in Section 702 waives immunity to permit the automatic imposition of a lien on United States Treasury funds in the first instance. Imposing a lien on government funds is not "an action in * * * court." It is not

[8] Because a subcontractor has no enforceable rights against the United States, respondent would not in any event have standing to sue to require the Army to withhold (or recover) funds from Verdan or Dynamic, because that relief would not result in payment to respondent to redress its injury. See, *e.g.*, *Federal Election Comm'n* v. *Akins*, 118 S. Ct. 1777, 1783 (1998).

a suit for "judicial review." And it does not pass on "agency action." See Gov't Br. 46.[9]

III. THE RELIEF RESPONDENT SEEKS IS IMPLIEDLY FORBIDDEN BY OTHER STATUTES

Federal courts lack "authority to grant relief" under the APA "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702. In this case, the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, bars the remedy respondent seeks by prohibiting equitable relief in contract actions against the United States and by precluding relief on implied-in-law payment claims like that asserted by respondent. Gov't Br. 47-50.

[9] Respondent's claim (Br. 33) that this argument was not raised before the Ninth Circuit is without merit. Because the Army argued in the Ninth Circuit that this suit is outside Section 702's waiver (see C.A. Br. 9), the Army may "make any argument in support of that claim" in this Court, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); "parties are not limited to the precise arguments they made below." *Ibid.* Moreover, because the issue is sovereign immunity, even a complete failure to raise the issue below would not bar its assertion here. See, *e.g.*, *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887). As this Court has explained, sovereign immunity is sufficiently "jurisdictional in nature," *Meyer*, 510 U.S. at 475, that the issue itself—and thus *a fortiori* particular arguments in support thereof—can be raised for the first time on appeal. *Finn*, 123 U.S. at 232; cf. *Patsy* v. *Board of Regents*, 457 U.S. 496, 516 n.19 (1982) (sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar that it may be raised by the State for the first time on appeal" (internal quotation marks omitted)). Respondent's further claim that the argument is not within the question presented also lacks merit. The question presented asks whether 5 U.S.C. 702 permits the assertion of an "equitable lien" against the government. See Pet. i. If such a claim falls outside the waiver of immunity in Section 702 because it does not seek judicial review of agency action, the answer to that question is "no." Moreover, the issue was identified in the certiorari petition. See Pet. 20-21 (whether relief is money damages is linked to the nature of "agency action" under review); Pet. Reply Br. 9 n.7 (action not for "judicial review").

A. Seeking to overturn the unanimous agreement of the courts of appeals (see Gov't Br. 48 n.25), amicus Chamber of Commerce denies (Br. 16) that the Tucker Act impliedly forbids equitable relief in contract suits. The unavailability of such relief, it argues, is a coincidence flowing from the fact that the Tucker Act designates the Court of Federal Claims—which largely lacks authority to give equitable relief—as the forum for most contract claims. Congress, however, is presumed to know the legal framework within which it acts. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). When it vests jurisdiction over certain causes of action (contract suits) in a court that lacks authority to grant equitable relief, the natural conclusion is that Congress intended such relief to be barred. In fact, this Court has drawn precisely that conclusion, holding that district courts, which have concurrent jurisdiction over Tucker Act claims for less than $10,000, are also barred from affording equitable relief on contract claims against the United States. *Richardson* v. *Morris*, 409 U.S. 464, 465-466 (1973) (per curiam); see also *United States* v. *Jones*, 131 U.S. 1, 17-19 (1889).

To the extent there could be any doubt as to whether the Tucker Act "impliedly forbids" equitable relief on contract claims within the meaning of Section 702, the legislative history of the 1976 amendment dispels it. As one of the drafters of the amendment explained: "You cannot get specific performance of a Government contract; injunctive and declaratory relief are unavailable. * * * The bill makes it entirely clear that this situation is not affected in the slightest. * * * [T]he Tucker Act is in fact an act consenting to suit which impliedly forbids injunctive and declaratory relief." *Senate Hearing*, *supra*, at 50 (Prof. Cramton). Although that statement and many others like it—made in both Committee Reports and hearings—are cited

and quoted in our opening brief (at 48-49 n.26), the Chamber of Commerce ignores them.[10]

B. Respondent argues, however, that the Tucker Act does not bar its equitable lien action because the Tucker Act does not "consent" to "equitable lien" suits. Resp. Br. 37-38 (quoting *Katz* v. *Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994)). Nothing in the "impliedly forbids" proviso, however, limits its application to statutes that consent to the particular action the plaintiff seeks to assert. To the contrary, if the statute consents to suit for the general subject matter of the plaintiff's suit, but bars the relief the plaintiff seeks, the relief is "impliedly forbid[den]" within the meaning of Section 702. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 286 n.22 (1983) (if suit is untimely under "[an]other statute," that statute forbids relief under Section 702).

Respondent's alternative argument—that its claim does not fall within the subject matter of the Tucker Act because it is not a contract claim, Resp. Br. 38-39—fares no better. Respondent's claim necessarily is based on contract: As the court of appeals recognized, absent Verdan's contract with the Army (and respondent's contract with Verdan), respondent would have no claim at all. See Pet. App. 7a (respondent seeks "the very thing to which it is entitled under the contract"). Respondent, moreover, characterizes its action as a suit for "restitution," "unjust enrichment," or satisfac-

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[10] Nor does this Court's reference in *Bowen* to equitable relief on contracts (Chamber of Commerce Br. 18-19) support the Chamber's view. *Bowen* was not a contract case; and it did not address the "impliedly forbid[s]" language of Section 702. The *Bowen* passage merely gives an example of the sort of remedy that, in private contract actions, may be considered "specific relief" rather than damages. 487 U.S. at 895. It thus can hardly be read to suggest that such relief is not impliedly precluded by the Tucker Act. Indeed, the language upon which the Chamber relies is a quotation from an opinion of the D.C. Circuit, which has long recognized that the Tucker Act "impliedly forbid[s]" equitable relief in contract actions. *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.).

tion of a payment obligation arising "by operation of law." See Resp. Br. 13-16, 38-39. Those characterizations are merely alternative formulations for implied-in-law contracts—obligations that arise not because a party has agreed to be bound, but rather from the perception that the party ought to be bound. Gov't Br. 49. Because the Tucker Act bars such suits, and permits suits only on express and implied-in-fact contracts, *Hercules, Inc.* v. *United States*, 516 U.S. 417, 423-424 (1996), respondent's demand for monetary relief on those claims is "impliedly forbid[den]" under the APA.[11]

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1998

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[11] Contrary to respondent's assertion (Br. 39-43), *Pearlman* did not reject the argument that the Miller Act "impliedly forbids" subcontractor equitable lien actions. See Gov't Br. 49-50, n.27. That case addressed neither the "impliedly forbids" language of Section 702 nor the ability of subcontractors to assert claims directly against the government. Instead, it held that the Miller Act does not affect the rights of sureties to seek money from other private parties through subrogation. 371 U.S. at 139-140; see pp. 5-7, *supra*. Thus, it nowhere addressed whether the Miller Act, because it provides subcontractors with a special cause of action (in the name of the government) on the payment bond, impliedly precludes subcontractors from seeking other remedies *against* the government.